by counsel may be considered as not making such persons parties to the petition.

**Note.**

The court in this case very wisely calls attention to the danger of departing from what the legislature actually said in favor of a supposed intention of the legislature. That a statute is to be construed according to the intent of the legislature is not a rule of construction at all, but such intent is the object of construction. Where a statute is clear in its term, there is no necessity for construction at all and the legislative intent is of no consequence. It is only in the case where the statute in its wording is not clear that the legislative intent is to be sought for and thus becomes the object of construction. As the law is the will of the legislature and the only act in which that will is spoken is in the act itself, the legislative meaning is to be sought in the words they have used, and if clear the letter of the law controls, unless in exceptional cases where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent or unless to avoid absurd, unjust or inconvenient circumstances.

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## SUPREME COURT OF APPEALS OF VIRGINIA.

SOUTHERN RY. CO. *v.* RICE'S ADM'X.

June 12, 1913.

[78 S. E. 592.]

**1. Negligence (§ 76*)—Contributory Negligence—Violation of Ordinance.**—As a general rule a person negligently injured cannot recover if he was at the time of the injury doing some act in violation of a statute or ordinance which contributed to his injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 104-107; Dec. Dig. § 76.*]

**2. Negligence (§ 119*)—Contributory Negligence—Pleading—Proof.**—Contributory negligence may be shown under a plea of not guilty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

**3. Death (§ 57*)—Contributory Negligence—Pleading—Proof.**—Under an allegation of the plea in an action for intestate's negligent death that intestate "was guilty of contributory negligence," defendant could introduce any evidence showing that intestate was per se guilty of contributory negligence or circumstances tending to show contributory negligence.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74; Dec. Dig. § 57.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

**4. Trial (§ 260*)—Refusal of Instructions.**—The refusal to instruct that, while the jury were the judges of the facts, the court was the judge of the law and it was the jury's duty to accept and act upon the law as stated in the instructions, the jury applying the facts as they might determine them thereto, was not error, where the court instructed that it was the judge of the law as applied to the case, and the jury were the judges of the facts and the weight of the testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

**5. Master and Servant (§ 274*)—Injuries—Admission or Evidence.**—As a rule it is not permissible, in an action for a railroad employee's death, to show that deceased had the reputation among his fellow employees as a fast runner and had previous to the fatal accident disregarded speed ordinances, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

**6. Master and Servant (§ 274*)—Injuries—Admission of Evidence.**—In an action for a railroad employee's death by derailment of his engine, evidence that decedent had the reputation of running fast and had exceeded the speed ordinances before the accident was not admissible, where the uncontradicted evidence showed that he was running his engine at 12 to 15 miles an hour instead of the maximum of 4 miles an hour permitted by the ordinances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.*]

Error to Law and Equity Court of City of Richmond.

Action by Rice's Administratrix against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

*Munford, Hunton, Williams & Anderson*, of Richmond, for plaintiff in error.

*Hunsdon Cary* and *Wm. Crump Tucker*, of Richmond, for defendant in error.

BUCHANAN, J. This is an action to recover damages for the alleged negligence of the Southern Railway Company, which resulted in the death of the plaintiff's intestate, James G. Rice.

The decedent was an engineman of the railway company in charge of one of its yard engines. His death was caused by the derailment and overturning of his engine at or near Fourteenth street, in the city of Richmond. Conceding that the evidence is sufficient to show that the defendant company was guilty of negligence in the construction and maintenance of its track where the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

engine was derailed, there was evidence tending to show that the deceased, when operating his train at the time he was injured, was violating a speed ordinance of the city of Richmond, and that, if he had been operating his engine within the speed limit, there would have been no accident, and he would have suffered no injury, notwithstanding the condition of the track.

The speed limit fixed by the ordinance for engines, etc., on a railroad track in a street was not to be in excess of four miles an hour, and any one who propelled it at a greater rate of speed or caused it to be done, or assisted in doing it or causing it to be done, was subject to a fine of $10.

There was evidence that the engine operated by the plaintiff's decedent was moving with 15 loaded and 5 empty cars from the eastern end of the city over or across Fourteenth street, on a slight upgrade, on its way to Manchester; that just before reaching the line of Fourteenth street, or while in the street, the engine was derailed, passed over the street, over the sidewalk, into the yard on the west side of the street, over or across a side track, thence to another side track on which was standing a box car, with which the engine collided and was overturned. The injuries causing the death of the plaintiff's intestate were from escaping steam, resulting from the overturning of the engine. The evidence further tended to show that the distance which the engine moved after it was derailed before it collided with the box car was some 130 feet or more, and that if the engine had been running within the speed limit it would not have gone after it was derailed with its train anything like that distance.

The principal question involved in this writ of error is as to giving and refusing instructions.

The contention of the defendant company is and was that the plaintiff was not entitled to recover if it appeared from the evidence that at the time her decedent was injured he was operating his engine in violation of the speed ordinance of the city, and that the excessive speed at which he was running his engine contributed to his injury. The plaintiff, on the other hand, insisted and insists that such violation of the ordinance did not bar her recovery unless the jury believed from the evidence that the plaintiff's interstate was operating his engine at a negligent rate of speed, and, if so, that such negligence contributed to his injury. In other words, the question involved is whether the violation of the ordinance, such violation contributing to the plaintiff's intestate's injury, amounted as a matter of law to contributory negligence, or was merely evidence tending to show contributory negligence.

The railway company insists that the case of Atlantic & Danville R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590, and the cases in

which it has been followed, sustain the railway company's contention, while, on the other hand, the plaintiff claims that the case of Chesapeake & Ohio Ry. Co. v. Jennings, 98 Va. 70, 34 S. E. 986, directly, and certain other of our cases indirectly, sustain her contention.

Without reviewing the cases relied on by either the plaintiff or defendant or attempting to harmonize the real or apparent conflict between them, if any, we will consider the question involved here as one of first impression in this state, since none of the cases relied on by either side present the question of the right of an engineman to recover damages from his employer for injuries suffered when running his engine in violation of a city ordinance and such violation directly contributed to his injury.

[1] The text-books seem to be agreed that the general rule is that, if the person injured was at the time he received the injury doing some act in violation of a statute or ordinance, he cannot recover, if such violation contributed to his injury.

Shearman & Redfield, in their work on Negligence (5th Ed.) vol. 1, § 104, lay it down as the general rule that: "If the plaintiff is acting in violation of a statute or ordinance at the time the accident occurred, and such violation proximately contributes to his injury, he is guilty of contributory negligence. But, if such violation does not contribute to the injury, it is no defense."

Labatt on Master & Servant, § 362, says: "There can be no question that where a servant's injury was proximately caused by the fact that he was violating a statutory or municipal ordinance, the meaning and effect of which are perfectly clear, he cannot recover damages."

In Cooley on Torts (3d Ed.) vol. 1, pp. 273, 274, it is said that the fact that a party injured was at the time violating the law does not put him out of the protection of the law; he is never put by the law at the mercy of others. If he is negligently injured on the highway, he may have redress, notwithstanding at the time he was upon the wrong side of the road, provided that act did not contribute to his injury.

29 Cyc. 525, in stating the general rule, says that: "If the person injured was at the time of receiving the injury doing some act in violation of a statute or ordinance, such person cannot recover if such violation contributed to the injury; the violation amounting to contributory negligence."

In 7 Am. & Eng. Enc. Law (2d Ed.) the general rule is stated as follows: "It is not contributory negligence per se for the injured person at the time of his injury to be engaged in a violation of law, either positive or negative in its character. Before an illegal act or omission can be held contributory negligence, it must appear that such act or omission was a proximate cause of

the injury. It is usually held that the mere collateral wrongdoing of the plaintiff cannot of itself bar him of his action when it did not proximately contribute to his injury." Thompson on Neg. (2d Ed.) § 11; Beech on Contributory Neg. § 47; 4 Dillon, Mun. Corp. note, p. 3004, cases.

The general rule as laid down by the text-writers quoted and by others which might be cited seems to be fully sustained by reason and authority.

The reason why no recovery is permitted in such a case is based upon grounds of public policy. That principle of public policy is this (as stated by Lord Mansfield in Holmes *v.* Johnson, and quoted with approval in Roller *v.* Murray, 112 Va. 780, 783, 784, 72 S. E. 665, 38 L. R. A. [N. S.] 1202, Ann. Cas. 1913B, 1088): "Ex dolo malo non oritur actio —no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act; if from the plaintiff's own stating or otherwise the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

While this rule finds its application more frequently in actions upon illegal contracts, it applies to cases in tort. It is immaterial, as was said by Judge Gray in Hall *v.* Corcoran, 107 Mass. 251, 253 (9 Am. Rep. 30): "Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part." See, also, 1 Am. & Eng. Enc. Law & Pr. 1024; 38 Cyc. 529, 530, and cases cited in the notes to each: Newcomb *v.* Boston Protection Dept., etc., 146 Mass. 596, 602, 16 N. E. 555, 4 Am. St. Rep. 354; Broschart *v.* Tuttle, 59 Conn. 1, 21 Atl. 925, 11 L. R. A. 33.

The case under consideration seems to some clearly within the general rule that although a person has sustained damages, if the damages arose out of an illegal act or transaction in which he was engaged, he cannot recover.

In Newcomb *v.* Boston Protection Dept., supra, it was said in the opinion of the court that "no case has been brought to our attention, and upon careful examination we have found none in which a plaintiff, whose violation of law contributed directly and proximately to cause him an injury, has been permitted to recover for it; and the decisions are numerous to the contrary."

It was held in M., K. & T. Ry. Co. *v.* Roberts (Tex.) 46 S. W. 270, that an employee (an engineman) could not recover damages from his employer for injuries suffered while running his

engine within the limits of a city at a higher rate of speed than that fixed by ordinance, if such negligence proximately contributed to the injury.

Little *v.* Southern Ry. Co., 120 Ga. 347, 47 S. E. 953, 66 L. R. A. 509, 102 Am. St. Rep. 104, decides that an employee (engineman) of a railroad company cannot recover damages from his employer for injury suffered while running his engine in violation of a penal statute or a municipal ordinance, if such injury was proximately caused by such violation.

In each of the two cases last cited it was sought, as in this case, to escape the effect of the plaintiff's conduct in violating the ordinance, etc., upon the ground that the defendant itself was responsible for such violation; but in each it was held, and properly so, we think, that, if the railway knew that the ordinance was regularly violated by its employees, it would not relieve the violator of the law of the effects of such violation. It would be contrary to public policy for the courts to relieve a person of the effect or consequence of his violation of law upon the ground that the railroad company and its employees were in the habit of violating the particular law.

The plaintiff insists that even if the evidence showed that her intestate was violating the city speed ordinance when injured and that such violation directly contributed to his injury, and was therefore negligence as a matter of law, instructions A, B, and E, which so told the jury, were properly rejected by the court, because such violation of the ordinance was not stated in the railway company's grounds of defense.

[2, 3] One of those grounds of defense (the fifth) states: "That the plaintiff's intestate was guilty of contributory negligence." In order to prove that the plaintiff's intestate was guilty of contributory negligence, no other than the plea of "not guilty" was necessary. On motion of the plaintiff, the court ordered the railway company to file the particulars of its defense, which was done. No objection was made to the statement filed. Under the fifth ground stated, the railway company clearly had the right to introduce any evidence which showed that the plaintiff's intestate was per se guilty of contributory negligence, or, being relevant, tended to show along with the other facts and circumstances of the case contributory negligence.

From what has been said, it follows that the court is of opinion that the trial court erred in refusing to give instructions A, B, and E offered by the railway company, and in giving instruction No 7, which is in conflict with them.

[4] The refusal of the court to give the following instruction offered by the railway company as assigned as error: "The court instructs the jury that, while they are the judges of the facts,

the court is the judge of the law, and it is the duty of the jury to accept and act upon the law as stated in the instructions; they applying the facts as they may determine them thereto."

While the instruction in question correctly stated the law, no prejudice resulted to the plaintiff in error from the court's refusal to give it, since the court stated to the jury, after reading to them the other instructions given, that the court was the judge of the law as applied to the case, and they were the judges of the facts and the weight of the testimony.

[5] The court refused to permit the railway company to introduce evidence tending to show that the plaintiff's decedent had the reputation among his fellow employees as a fast runner and had previous to the accident in which he was injured, and at the same point, disregarded the speed ordinance. This action of the court is assigned as error.

The general rule is that such evidence is not admissible.

Prof. Wigmore, in his work on Evidence, § 65, in discussing the admissibility of evidence of that character, says: "A few courts have shown an inclination to admit exceptionally the character of a person charged with a negligent act (contributory negligence if a plaintiff) as throwing light on the probability of his having acted carelessly on the occasion in question, provided that the other evidence leaves the matter in great doubt, or that the evidence is purely circumstantial, or (as sometimes put) that there are no eyewitnesses testifying. * * * Such evidence is no doubt likely to be of some probative value in such cases, and under the above limitations is hardly contrary to the ordinary policy of avoiding confusion of issues (ante 64). As a matter of law, however, the doctrine is maintained in a few jurisdictions only and has been expressly repudiated in many."

[6] Even in those jurisdictions where this exceptional rule prevails, as stated by Prof. Wigmore, the rejected evidence would not have been admissible under the facts of this case, since the uncontradicted evidence shows that the engineer was running his engine at a speed of from 12 to 15 miles an hour instead of 4 miles, the maximum speed permitted by the ordinance. The court properly rejected the evidence.

For refusing to give instructions A, B, and E offered by the railway company, and for giving instruction No. 7, the judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

Reversed.

**Note.**

Just how far the violation of the statute or ordinance taints one with negligence is the interesting question decided in this case, but

unfortunately so decided as to leave the status of the law uncertain in its application to various occupations. Our court in C. & O. Ry. Co. *v.* Jennings, 98 Va. 70, 34 S. E. 986, upheld an instruction laying down the principle that if such violation was negligent and contributed in any way to the injury of the plaintiff he could not recover. There the plaintiff sued the defendant for negligence in failing to keep in repair a bridge over which the plaintiff was riding when injured. The evidence showed that the plaintiff was riding over the bridge faster than a walk, in violation of § 3863 of the Code of Virginia. The principle laid down in this case seems to be perfectly clear and free from befogging exceptions and conditions, the court instructing the jury that if they believe from the evidence that such riding was negligence, and that it contributed in any way to the injury of the plaintiff, they must find for defendant, Judge Cardwell saying in this case: "The instruction was properly modified by the court and went as far as it should have gone when it told the jury that riding over the bridge faster than a walk was unlawful, and rightly left to the jury to determine whether such riding was negligent, and whether the negligence contributed in any way to the injury of the plaintiff." In the present case the court has laid down a new interpretation of the law, holding that one injured while violating an ordinance or statute can not recover if such violation in any way contributed to the injury. They ignore entirely the questions as to whether plaintiff was guilty of actual negligence or not, and apparently decided that the violation of an ordinance is negligence per se, and if it contributed to the injury bars recovery. Now the unfortunate feature of this decision is the refusal of the court to either follow or overrule the Jennings case, the court merely saying: "Without reviewing the cases relied on by plaintiff or defendant or attempting to harmonize the real or apparent conflict between them, if any, we will consider the question involved here as one of first impression in this State, since none of the cases relied on by either side presents the question of the right of an engineman to recover damages from his employer for injuries suffered when running his engine in violation of a city ordinance, and such violation directly contributed to his injury." It would seem that the court bases its distinction solely on the ground that in one case plaintiff was a horseman and in the other an engineman and we are led to believe that should a horseman again have occasion to invoke the aid of the law the principle as laid down in the Jennings case would govern and relief be granted. But suppose the next unfortunate was the driver of an automobile, which phase of the doctrine would apply? Or a street car conductor, or teamster, or any one of a hundred occupations? Has the court laid down one rule of recovery in such cases for a man on a highway and another for a man on a railroad? And yet what other construction can be put upon the court's opinion in these two cases. If such is the law, how is the bar to advise, or lower courts to decide, when similar questions arise? Is the right of recovery to be based upon the contributory negligence rule of the Jennings case, or upon the public policy rule of the Rice case? The case of C. & O. Ry. Co. *v.* Jennings, supra, has never been overruled or questioned by any subsequent decision, and until overruled it stands as the law of the state. It was relied on by the lower court in the present case as furnishing the law controlling the case, and if now set aside, it should either have been overruled in terms or distinguished upon some basis to be a guide to the trial courts in future cases. Under the Jennings case and the opinion in the present case

it will be not only impossible for trial courts to know which rule to apply but counsel will be unable to advise their clients, involving in any such case the labor and expense of an appeal to the Supreme Court. The principal point decided in this case has been passed upon in the Jennings case, supra, by our own court and by the courts of many of the states and of England, and has been given a contrary interpretation to that laid down by the court in the present case. In the recent English case of Ellis *v.* Sheffield Gas Consumers' Co., 75 Eng. C. L. Rep. 766, Chief Justice Campbell said it would be "monstrous" to allow a corporation to escape the consequences of its own negligence when one of its employees was injured while doing an illegal act when the employer engaged him to do it.

The court in its opinion cites Little *v.* Southern Ry. Co., 120 Ga. 347, and M. K. & T. Ry. Co. *v.* Roberts (Texas), 46 S. W. 270, in support of the proposition that "if the railway knew that the ordinance was regularly violated by its employees, it would not relieve the violator of the law of the effects of such violation. It would be contrary to public policy." The Georgia case was decided upon the authority of M. K. & T. Ry. Co. *v.* Roberts (supra) and three Georgia cases, viz, Wallace *v.* Cannon, 38 Ga. 199; Martin *v.* Wallace, 40 Ga. 52, and Redd *v.* Muscogee R. Co., 48 Ga. 102, all of which were decided upon the old public policy rule. In the recent case of Hughes *v.* Atlanta Steel Co., 136 Ga. 511, the three above-mentioned Georgia cases are specifically overruled, and the old doctrine abandoned. In this last-mentioned case (Hughes *v.* Atlanta Steel Co.), which was an accident occurring on a Sunday in violation of a penal statute, the court in bidding good-bye to the old public policy rule, which governed the decision of our court in the principal case, said: "In effect it would be to allow an independent public offense to be set off against a private wrong." The other case, M. K. & T. Ry. Co. *v.* Roberts, supra, is disapproved by Judge Thompson in his work on negligence. See 5 Thomp., Neg. §§ 54, 65. It is well-settled law that when a railroad rule intended for the protection of the employee is violated by the employee with the knowledge and consent of the railroad, the railroad is not allowed to set up the violation of the rule as a defense. It would seem that by analogy the road should be estopped to set up a violation of an ordinance under similar circumstances, particularly when the ordinance was not intended for the employee's protection.

**Exception to General Rule—Where Party Injured Not in Class for Whose Benefit Law Enacted.**—There is a well-recognized exception to the general rule as laid down by the court in the principal case. Both text-book writers and courts have announced the rule that where a party is injured while violating a statute which was not intended for his own protection, he may recover unless he was guilty of contributory negligence. In 29 Cyc. 525, the law is thus stated: "As in the case of violation of a statute or ordinance by a defendant, it is necessary that the statute or ordinance be intended to prevent such an injury as is the ground for suit, and where it has no relation to the act causing the injury, violation of it will not be contributory negligence. In addition, the violation of the statute or ordinance must be the proximate cause of the injury." The court cites Labatt on Master and Servant as authority for the general rule laid down. In the second edition of this work the author, after stating the general rule as quoted in the court's opinion, gives the exception as follows: "The rule is also subject to the qualification that the violation of a statute will not necessarily prevent a recovery where the statute was not

enacted for the benefit of the servant." Citing Choctaw *v.* Doughty, 77 Ark. 1; Currello *v.* Jackson, 77 Conn. 115; St. Louis, etc., R. Co. *v.* Caraway, 77 Ark. 405. Most of the cases in which the violation of an ordinance on the part of the plaintiff have been considered, plaintiff or defendant has been within the class of persons intended to be benefited by the ordinance. In such cases the neglect to comply with the provisions of such ordinance, which contributes to his injury, is a breach of duty which the plaintiff owes the defendant because of the ordinance. In those cases however, in which the ordinance was not intended for the benefit of the injured party, the courts have upheld the exception to the general rule and allowed a recovery. In Central of Ga. Ry. Co. *v.* Martin, 138 Ala. 531, it is said that the negligence of an engineer in failing to comply with the provisions of certain statutes and ordinances as to giving signals at crossings and limiting the speed of trains within the limits of the cities and towns, "could neither be made the basis of an action against his company for the result of a collision with a train of another company on the same track, nor afford the defense of contributory negligence against his action for personal injuries sustained by him in such collision, due to the negligence of the trainmen on the other train leaving their train at an unusual place on the track and failing to give proper warning to him. The engineer's duty under the statute and the ordinance were not owed to the other company or their trainmen, and his negligent failure to perform them cannot afford such company a cause of action nor a ground of defense." In Watts *v.* Montgomery Traction Co. (Ala.), 57 So. 471, the court said that when the violation of an ordinance by the plaintiff is a proximate cause of the injury complained of, this may be set up as a defense, but adds: "The statute or ordinance violated, however, must have been enacted for the benefit of the party who seeks to invoke its violation as distinguished from the public generally or a class to whom the ordinance necessarily applies."

It was not contended that the ordinance was passed for the benefit of the engineer, it clearly being intended for the benefit of the public—travelers other than employees of the railroad company. In Norfolk, etc., Railway Co. *v.* Corletto, 100 Va. 355, and Norfolk & P. Co. *v.* Forrest, 109 Va. 657, it was held that ordinances regulating speed of trains in streets are "clearly intended for the protection of travelers." And in Birmingham Ry. L. & P. Co. *v.* Moseley, 164 Ala. 111, the court said: "City ordinances regarding the speed of cars are made for the protection of the public, where they have the right to cross or be upon the track of the railway, and not for the benefit of employees operating such cars upon such railway." The violation of the ordinance by the engineer in the principal case was therefore no violation of duty owed the defendant railroad company, and if the rule, as laid down by the authorities, were applied such violation would be no bar to recovery by the engineer, provided he was not guilty of negligence in running his train. Our court, however, has refused to recognize this exception to the general rule though it would seem to be supported by the great weight of authority.

M. B.